night, the defendant could see the deceased about 100 feet ahead with his headlights on as the latter was cycling towards Butterworth along the bicycle track. He did slow down as he said, but as the scratch mark (see JK on page 3 of "A") on the road was 39 feet long, I found that he was travelling at some speed just before the collision. Although one of the photographs shows that the deceased's bicycle had a lamp, the plaintiffs have not proved that it was in working condition and I had no reason to disbelieve the defendant and therefore found that the deceased had no lights on that night. According to the defendant, he first saw the cyclist turn round when he was about 15 feet away from him. That shows that he had not kept a continuous look-out although he was aware of the presence of the cyclist when he was about 100 feet away from him. Looking at the sketch plan on page 3 of Exhibit "A", I was of the view that the impact was somewhere before the point marked J where the skid started. I therefore found that the collision took place somewhere near the middle white line and at a point between the middle and the left-hand side of the road, half of which is about 13' 3" wide. A cyclist would have taken a longer time to travel about 13 feet compared to a motor-cyclist even if the latter was travelling at about 30 m.p.h. Therefore if the motor-cyclist had kept a continuous look-out on the deceased, he could have seen him turn suddenly more than 15 feet away. I therefore found that the motor-cyclist was negligent. But it was obvious that the deceased cyclist was also guilty of contributory negligence in riding a bicycle at night without lights and having turned round suddenly either without looking behind him first, or if he had done so, in crossing the road when he knew that there was an oncoming vehicle not far behind him. Looking at the right middle photograph on page 6 of Exhibit "A", I found that the bicycle was hit on the chain box by the defendant's motor-cycle when the deceased was at right angle to and had moved across part of the road in the path of the defendant's motor-cycle. In my opinion, the deceased's negligent act in turning and cutting across the road was the substantial cause of the accident. In the circumstances of this case, I therefore found that the deceased was four-fifths responsible for the accident whilst the defendant was only one-fifth to blame.

On the question of general damages, counsel for defendant pointed out that the $180 per month given to the widow included the cost of food for the deceased himself. He submitted that the amount required to feed the widow and the children would be $120 per month. As the deceased was 35 years' old at the time of his death, 20 years' purchase would be sufficient and one-third of the period should be deducted for contingencies. Counsel for plaintiffs, on the other hand, contended that only a few dollars a month were required to feed the deceased himself and that there should be 20 years' purchase at $180 per month. In my view, it would be reasonable to consider that the deceased's food would have cost $50 per month and I found that the widow and the children's loss of support was therefore $130 per month. I considered that the deceased, who was 35 years old at the time of his death, should have another 20 years' working life if he had not been killed in the accident. Allowing for the usual imponderables, 15 years' purchase would be reasonable and fair. On that basis I assessed general damages at $16,192.28 under section 7 of the Civil Law Act, 1956 (see annuity table on page 1014 of *Dass* on Quantum in Accident Claims). The conventional figure of $3,500 under section 8 is merged in the aforesaid higher award. I allowed $750 for special damages, which included $350 for the cost of applying for Letters of Administration and $400 for funeral expenses. In addition to the order for general and special damages, I also made the usual order for interest at 6% on the general damages from the date of service of the writ to the date of satisfaction and 3% interest on the special damages from the date of accident to the date of realisation. In view of my finding on contributory negligence, only one-fifth of the amount of general damages will represent the award to the plaintffs, out of which I also ordered that one-third thereof should be paid to the widow and the balance to be held in trust by the Public Trustee for the three minor children in equal shares. Finally, I ordered that one-fifth of the taxed costs on the lower scale be paid to the plaintiffs.

Order accordingly.

Solicitors: *V. Muthusamy & Co.; Ajmer Singh Sandhu & Co.*

MEK BINTI IDRIS v. NOR BIN AWANG

[O.C.J. (Mohamed Zahir J.) March 23 and September 7, 1977]
[Kota Bahru — Civil Suit No. 166 of 1974]

Land Law — Kelantan Land Settlement Ordinance 1955 — Aggrieved party bringing suit against District Officer under 16(1) of Ordinance — Procedures to be complied by aggrieved party — Kelantan Land Settlement Ordinance, 1955, ss. 5(1), 7, 8(1), 10, 16(1) & (2).

The subject matter of this case was a one-half share of a piece of land in which the plaintiff was the original owner. At the first hearing, the hearing officer ordered the said land to be registered in the name of the plaintiff under section 7 of the Kelantan Land Settlement Ordinance. The first defendant alleged that he bought the said land from the plaintiff's father and that he had been in occupation. He appealed to the District Officer under section 16(1) and the latter reversed the decision of the hearing officer and ordered that the defendant be registered under section 8(1) with a possessory title to the land. The plaintiff did not appeal against the order of the District Officer under section 16(1) but instead, he brought the suit under section 10 of the said Ordinance. The plaintiff claimed, *inter alia*, that she was the lawful registered proprietor of the said land and that the District Officer had acted *ultra vires* the provisions of the said Ordinance.

Held, striking out the plaintiff's claim: (1) if a person aggrieved by the decision of the District Officer was desirous of setting it aside on the same arguments pleaded before the latter then he had to do so by way of appeal under section 16(2) of the said Ordinance;

(2) the present case was not the assertion of a superior title by the plaintiff. It was a claim to set aside the order of the District Officer for being *ultra vires*, and the plaintiff should have appealed against the order.

Cases referred to:-

(1) *Deraman & Ors.* v. *Mek Yam* [1977] 1 M.L.J. 52.

(2) *Fatimah* v. *Wok* [1964] M.L.J. 318.

(3) *Som binti Daud & Ors.* v. *Nik Mustaffa bin Nik Idris & Ors.* [1978] 1 M.L.J. 13.

CIVIL SUIT.

C. Jegathesan for the plaintiff.

Yusof bin Haji Mohamed Nor for the first defendant.

Wan Mohamed bin Muda (State Legal Adviser) for the second defendant.

Mohamed Zahir J.: This suit came up before me to determine whether the case should be struck out in the light of the recent Federal Court decision in *Deraman & Ors.* v. *Mek Yam.*[1]

The subject matter of this case involves one-half share of a piece of land held in Lot No. 353 in Mukim Tanjong Jering, District of Bachok, Kelantan, in which the plaintiff was the original owner. In the first hearing under the Kelantan Land Settlement Ordinance, 1955 the Hearing Officer at Bachok on August 18, 1973 ordered the said land to be registered in the name of the plaintiff under section 7 of the Ordinance. The 1st defendant who alleged that he bought the said land from the plaintiff's father and that he had been in occupation thereof being dissatisfied with the decision appealed to the District Officer under section 16(1) and the appeal was heard on December 22, 1973 and the District Officer reversed the decision of the Hearing Officer and ordered that the defendant be registered under section 8(1) with a possessory title to the land. The plaintiff did not appeal against the order of the District Officer under section 16(1), instead she brought the suit under section 10 of the said Ordinance before this court for an order as follows: —

"(i) declaring:

(a) her to be the lawful registered proprietor of a ½ share in all that parcel of land known and identified as Lot 353 in Mukim Tanjong Jering Daerah Tanjong Pauh Jajahan Bachok (hereinafter referred to as the land);

(b) that Nor bin Awang the first defendant has no title whatsoever to the land — legal or equitable.

(ii) that the second defendant acted *ultra vires* the provisions of the Kelantan Land Settlement Ordinance No. 51 of 1955;

(iii) that the possessory title granted to the first defendant on December 22, 1973 be set aside;

(iv) the plaintiff be confirmed in ordinary title to the land;

(v) costs of this civil suit."

Mr. Jegathesan, counsel for the plaintiff, argued that the plaintiff's claim is for a superior title and the claim was, therefore, properly instituted by way of a suit under section 10 and not by way of an appeal under section 16(1) of the Ordinance.

Mr. Yusof, counsel for the Defendant No. 1, argued that there was no superior title involved. He pointed out the Enquiry Officer had decided whether the defendant was a purchaser or not and the District Officer under section 5(1) had decided as to who was the registered proprietor. He argued that *Fatimah* v. *Wok*[2] is not an authority applicable to this case as in that case there was no argument on these points and that the party aggrieved in that case had exhausted the remedies of appeal. He pointed out that the statement of claim did not plead fraud and the claim should be dismissed.

I must say that the statement of claim is scanty. Paragraphs 1, 2, 3 & 4 merely set out the circumstances as to how the land was registered in the name of the plaintiff and how the 1st defendant became to be granted possessory title thereof.

Paragraph 5 of the statement of claim states as follows: —

"At the Ulang Bicara Stage the first defendant's cause was essentially that of Specific Performance by reason of sale and purchase of the land from the plaintiff's father in his lifetime."

Paragraph 6 of the statement of claim states as follows: —

"The second defendant's finding at appeal instance is therefore *ultra vires*, the Kelantan Land Settlement Ordinance No. 51 of 1955;"

and paragraph 7 states as follows: —

"The first defendant had not in fact acquired any title whatsoever to the land be it legal or equitable."

Thereafter, the statement of claim enumerated the prayers quoted above. Although there was evidence in the hearing before the District Officer that the defendant had possession of the land, there was nothing in the statement of claim asserting that the plaintiff had in fact possession of the land or if possession was with the defendant such possession was obtained by fraud or other means. Again, although there was evidence that defendant purchased the land from the plaintiff's father, yet there was no pleading by the plaintiff that there was no such purchase or if there was, it was a fraud or other defences. On the other hand, the plaintiff pleaded under paragraph 5 of her statement of claim that the 1st defendant's cause of action was that of specific performance and therefore it was *ultra vires* the Kelantan Land Settlement Ordinance. In pleading this to be her cause of action, I am of the opinion, she was misconceived. The District Officer did not order specific performance under section 8 of the Ordinance. All that he did was he found the defendant was in possession and he gave him possessory title and this has nothing to do with specific performance. If her cause of action is that the District Officer was *ultra vires* then it follows that what the plaintiff is seeking to do now is to set aside the order of the District Officer by asserting the facts already pleaded before the District Officer. The plaintiff should have appealed against the decision of the District Officer. The plaintiff's statement of claim should therefore be struck out on the simple reason that the District Officer in giving possessory title under section 8(1) is not *ultra vires* of his powers.

The principle that an aggrieved party is at liberty to file a suit under section 10 of the Ordinance has been confirmed by another Federal Court decision in *Som binti Daud & Ors.* v. *Nik Mustaffa bin Nik Idris & Ors.*[3] where in a unanimous decision, following Ali F.J.'s decision in *Deraman's* case and also following *Fatimah* v. *Wok's* case, the Federal Court allowed the appellant in that case liberty to file a separate suit claiming a superior title. The concluding sentence of the judgment in *Som binti Daud* v. *Nik Mustaffa* is as follows: —

"... we do not, however, think that every appellant who has failed before the District Officer is entitled to sue under section 10, it being our opinion that the correct procedure is best determined in the light of the disputed facts in each particular case."

My own interpretation as to what constitute disputed facts generally are as follows. If a person aggrieved by the decision of the District Officer is desirous of setting it aside based on the same arguments pleaded before the Settlement Officer or the District Officer then he has to do so by way of appeal under section 16(2) of the Ordinance. If however the aggrieved person is seeking to establish a superior title under section 10 then he has to file a fresh suit within a period of 3 years after the date of possessory title being registered in the name of the other party. In the suit the aggrieved party should not merely seek to set aside the order of the District Officer but to bring in other facts which may not be before the District Officer in order to establish his proprietory right, for instance, a sale agreement or trust and pleading fraud, misrepresentation, limitation, indefeasibility of title, etc. quite independent of the facts on possession as before the Land Office. The aggrieved party may even admit the correctness of the order by the District Officer as to the possession. There must be privity between the parties. The plaintiff must have the capacity to sue and the defendant be sued. If any party before the District Officer has no capacity, then any other person having such capacity should be joined as a defendant. Deceased person should be sued or be sued by his administrator and it is expected that within the 3 years granted it is sufficient to take out letters of administration.

Take a hypothetical case where a person is squatting on a land registered in the name of another. He may be granted possessory title under section 8(1) of the Ordinance notwithstanding that that person is having adverse possession inconsistent with section 341 of the National Land Code where it provides that adverse possession will not extinguish the title of the proprietor. Thus, if the squatter is granted possessory title then the proprietor is at liberty to bring a suit to establish his right as a proprietor under section 10 of the Ordinance pleading that the defendant is squatting on his land and that he has no legal right to the land provided he files the suit within the statutory period.

There is another aspect of the law which, I am of the opinion, is having quite a significant effect on the decision as to whether an aggrieved person should appeal or should file a suit. It would appear to me that the Collector and District Officer has under section 5(1) of the Ordinance powers to ascertain the following:

(a) who is in possession of the land;

(b) who is the registered proprietor;

(c) who is entitled to be registered as proprietor;

(d) whether any person has a registrable interest in any particular piece of land and the extent of such interest.

Thus, it would appear the Collector and District Officer has all the powers at an enquiry just for the purpose of *ascertaining*. But he cannot order specific performance which can only be exercisable by the High Court. What he can under the Ordinance if:

(a) he finds a proprietor in possession then he will make an order to that effect and in this instance he does not give an order for possessory title but absolute title under section 7 of the Ordinance;

(b) he finds any person other than the proprietor is in possession otherwise than holding under the proprietor, then he gives an order for possessory title under section 8 of the Ordinance.

Therefore, the proper step to be taken by an aggrieved person will be that he could only appeal if the District Officer orders absolute title under section 7 of the Ordinance and in this instance he cannot bring a suit under section 10 because section 10 gives the right to the aggrieved person to file a suit if only there is a possessory title. However, if the District Officer were to give an order for possessory title, a proprietor or a person entitled to be a registered proprietor will have a choice of whether to appeal or to file a fresh suit dependent on whichever method he thinks he has a greater chance of succeeding. A person in possession who may not be the proprietor or entitled to be registered as proprietor can only appeal for possessory title and he cannot file a suit as he cannot assert his superior title. All in all, whether an aggrieved party can appeal or file a suit depends on the order of the District Officer and that party's own interests in the land.

After having disposed of the above, I am of the opinion, the instant case before me is not the assertion of a superior title by the plaintiff. It is a claim for setting aside the order of the District Officer for being *ultra vires* against which order the plaintiff should have appealed.

In the circumstances, I strike out the plaintiff's claim with costs. I would add that the District Officer should not in the first place have been joined as a defendant by the plaintiff.

Claim struck out.

Solicitors: *C. Jegathesan & Co.; Yusof & Co.*

CHANG FAH LIN v. UNITED ENGINEERS (M) SDN. BHD. & ORS.

[O.C.J. (Abdul Hamid J.) January 21, 1976, June 6, 8 and September 12, 1977]

[Kuala Lumpur — Civil Suit No. 750 of 1971]

Labour Law — Employee injured in the course of work — Negligence — Failure to provide safe system of work — Implied contractual duty — Common law duty of care owed to employee — Master and servant relationship — Principles for determining — Direction and control of work, payment of wages.

Employment — Master and servant relationship — Independent contractor — Joint duty owed by several occupiers, controlling and supervising manner of work — Common law duty of care — Invitor/invitee relationship.

Torts — Invitor/invitee relationship — Duty of occupier to workmen lawfully on site and engaged in work.

Damages — Fractures of vertebrae, femur and transection of spinal cord — Incomplete paralysis of upper limbs and total paralysis of lower limbs.

On the day of the accident, the plaintiff was in the process of fixing zinc sheets on the roof at a height of twenty five feet from the ground when he slipped and fell down sustaining severe injuries. No safety belts were used because none was provided. The plaintiff was 28 years old at the time of the accident and he was earning between $300 to 350 monthly. As a result of the said accident, he sustained fractures of two